IN THE MATTER OF THE INTEREST ARBITRATION

BETWEEN

EMPLOYER
THE CITY OF MARKHAM
MARKHAM, ILLINOIS

AND

UNION
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO; LOCAL 726

I.S.L.R.B. Case No. S-MA-89-39

INTEREST ARBITRATION

DETERMINATION AS TO THE SCOPE OF DISCIPLINE SUBJECT TO THE GRIEVANCE-ARBITRATION PROCEDURE

OPINION AND AWARD

PRELIMINARY INFORMATION

CASE PRESENTATION - APPEARANCES

EMPLOYER

MICHAEL N. PETKOVICH
Attorney
KECK, MAHIN & CATE
8300 Sears Tower
233 South Wacker Drive
Chicago, IL 60606-6589
(312) 876-3400

UNION

LISA B. MOSS
Attorney
CARMELL, CHARONE, WIDMER & MATHEWS, LTD.
Suite 1110
39 South LaSalle Street
Chicago, IL 60603
(312) 236-8033

CHRONOLOGY OF RELEVANT EVENTS

Opinion and Award Rendered by the Majority of the Board of Arbitration (BOA) Finding the Subject of the Scope of Discipline Covered by the Grievance-Arbitration Procedure to be Arbitrable; Decision Dated	March 13, 1989
Arbitration Hearing on the Merits Held	April 12, 1989
Transcript of 158 Pages Received by the Arbitrator	April 18, 1989

COURT REPORTER

PATRICIA ANN LAMBROS, C.S.R.
Wolfe, Rosenberg & Associates
188 West Randolph Street
20th Floor
Chicago, Illinois 60601
(312) 782-8087 or 8088

LOCATION OF HEARING

Markham City Hall
16313 South Kedzie Parkway
Markham, Illinois 60426
(312) 331-4905

AUTHORITY TO ARBITRATE

Illinois Public Labor Relations Act,
as amended Effective January 1, 1987;
Section 14 (Ill.Rev.Stat. 1985, Ch. 48, par. 1601 et seq.)

Title 80: Public Officials and Employees
Subtitle C: Labor Relations
Chapter IV: Illinois State Labor Relations Board/
Illinois Local Labor Relations Board
Part 1230 Impasse Resolution
Subpart B: Impasse Procedures For Protective Services Units
Sections 1230.30 through 1230.110

WITNESSES (in order of respective Appearance)

FOR THE EMPLOYER	FOR THE UNION
RAY ASHLEY Chairman, Fire and Police Commission (FPC), City of Markham	NONE
WILLIAM P. BARRON **/ Police Officer, City of Markham; Member, Union Negotiating Committee; and Union Delegate, Board of Arbitration	

OTHERS IN ATTENDANCE AT HEARING

FOR THE EMPLOYER	FOR THE UNION
NONE	FRANK J. VERCILLO Recording Secretary Local 726, IBT

**/ Called as an adverse witness.

PARTIES' FINAL PROPOSALS

EMPLOYER'S PROPOSAL

The Employer proposes that the third paragraph of Article VI read as follows:

> Nothing contained herein shall limit the statutory authority of the City of Markham Fire and Police Commission. The grievance procedure set forth in Article VII of this Agreement shall apply only to matters outside the scope of the Fire and Police Commission's statutory authority.

UNION'S PROPOSAL

The Union proposes that the third paragraph of Article VI read as follows:

> An employee disciplined by the Chief shall have the option of appealing such disciplinary action either before the City of Markham Fire and Police Commission or through the grievance procedure set forth in Article VII of this Agreement. Such election must be made in writing within seven (7) days of the imposition of the discipline. If the employee elects to appeal the discipline through the contractual grievance procedure, he shall voluntarily sign and present to the City an express waiver of his right to appeal the matter before the Fire and Police Commission at the time his grievance is filed.

POSITION OF THE PARTIES

EMPLOYER'S POSITION

The Employer reasserts the arguments it advanced in the arbitrability of the issue in dispute, claiming said arguments have equal applicability to the merits of the issue here under consideration. Basically, the Employer submits that the Union's final proposal conflicts with the provisions of the Fire and Police Commission statute, an act that is both a mandatory and comprehensive scheme. The Employer submits that pursuant to Section 7 of the Illinois Public Labor Relations Act as amended effective January 1, 1987; Section 14 (Ill. Rev. Stat. 1985, Ch. 48, par. 1601 et seq.) it is not obligated under the duty "to bargain collectively" to negotiate over a matter with respect to a condition of employment that is specifically in violation of the provisions in any other law. The Employer further submits that pursuant to Section 7 of the Illinois Public Labor Relations Act, (IPLRA) it is obligated under the duty "to bargain collectively" to negotiate over a matter such as a condition of employment that is already covered by another law where the language mutually agreed to either supplements, implements, or relates to the effect of such provisions in other laws. The Employer asserts that its proposal supplements the Fire and Police Commission statute by agreeing to make discipline not covered under the jurisdiction of the Fire and Police Commission, specifically suspensions of 5 days or less and lesser forms of discipline, such as written reprimands, subject to redress under the Grievance-Arbitration Procedure already agreed to in Article VII of the Agreement. The Employer further takes the position that the ruling made by the majority of the BOA was wrong, that it misread and misinterpreted Sections 8 and 15 of the IPLRA in the arbitrability case and, as a result, it should not be forced through this arbitration into having to accept the Union's proposal on an issue it still contends is a permissive rather than a mandatory topic of bargaining.

As a second major argument, the Employer contends that, because there is an economic component attached to the Union's proposal, that is, the Employer must share by one-half, the costs mutually incurred in participating in an arbitration, the Union's proposal should be considered by the BOA in the context of the overall bargaining that occurred for this initial Agreement. The Employer argues that it has given into all of the economic demands made by the Union to the point where the City, given its revenue position, is burdened by debt and it would be a travesty to add to that burden by obligating it to operate under the language proposed by the Union for processing and handling all measures of discipline. The Employer submits acceptance of the Union's proposal would be especially difficult since this was the only issue on which it held steadfast to what it wanted whereas on all other issues it made significant compromises to the point of favoring the Union's position.

UNION'S POSITION

In its post-hearing brief, the Union advances the following points in argument in support of its position the BOA should adopt its proposal over that of the Employer's.

I.

THE ILLINOIS PUBLIC LABOR RELATIONS ACT MANDATES THAT THE PARTIES' COLLECTIVE BARGAINING AGREEMENT CONTAIN A GRIEVANCE MECHANISM COVERING DISCIPLINE

Section 8 of the Illinois Public Labor Relations Act provides:

> Grievance Procedures. The collective bargaining agreement negotiated between the employer and the exclusive representative shall contain a grievance resolution procedure which shall apply to all employees in the bargaining unit and shall provide for final and binding arbitration of disputes concerning the administration or interpretation of the agreement unless mutually agreed otherwise. Any agreement containing a final and binding arbitration provision shall also contain a provision prohibiting strikes for the duration of the agreement. The grievance and arbitration provisions of any collective bargaining agreement shall be subject to the Illinois "Uniform Arbitration Act". The costs of such arbitration shall be borne equally by the employer and the employee organization.

Ill. Rev. Stat. 1987, ch. 48, ¶1608 (emphasis added).

The parties' collective bargaining agreement contains a Management Rights Clause (Opinion and Award at 16). The Management Rights Clause provides in relevant part:

> [T]he City retains all rights, powers and authority to manage and direct the affairs of the City in all of its various aspects and to manage and direct its employees, including but not limited to the following: ..., to discipline, suspend and discharge employees for just cause (probationary employees without cause)....

January 25, 1989 Transcript of Proceedings, Jt. Ex. 3.

respect to each economic issue in dispute, the panel shall adopt the final offer of one of the parties, based on the following factors:

1) THE LAWFUL AUTHORITY OF THE EMPLOYER (Ill.Rev.Stat. 1985, ch. 48, par. 1614(h)(1));

2) STIPULATIONS OF THE PARTIES (Ill.Rev.Stat. 1985, ch. 48, par. 1614(h)(2));

3) THE INTERESTS AND WELFARE OF THE PUBLIC AND THE FINANCIAL ABILITY OF THE UNIT OF GOVERNMENT TO MEET THESE COSTS. (Ill.Rev. Stat. 1985, ch. 48, par. 1614(h)(3)).

4) COMPARISON OF THE WAGES AND CONDITIONS OF EMPLOYMENT OF THE EMPLOYEES INVOLVED IN THE ARBITRATION PROCEEDINGS WITH THE WAGES, HOURS AND CONDITIONS OF EMPLOYMENT OF OTHER EMPLOYEES PERFORMING SIMILAR SERVICES AND WITH OTHER EMPLOYEES GENERALLY:

A) IN PUBLIC EMPLOYMENT IN COMPARABLE COMMUNITIES.

B) IN PRIVATE EMPLOYMENT IN COMPARABLE COMMUNITIES. (Ill.Rev.Stat. 1985, ch. 48, par. 1614(h)(4)).

5) THE AVERAGE CONSUMER PRICES FOR GOODS AND SERVICES, COMMONLY KNOWN AS THE COST OF LIVING. (Ill.Rev.Stat. 1985, ch. 48, par. 1614(h)(5).

6) THE OVERALL COMPENSATION PRESENTLY RECEIVED BY THE EMPLOYEES, INCLUDING DIRECT WAGE COMPENSATION, VACATIONS, HOLIDAYS AND OTHER EXCUSED TIME, INSURANCE AND PENSIONS, MEDICAL AND HOSPITALIZATION BENEFITS, THE CONTINUITY AND STABILITY OF EMPLOYMENT AND ALL OTHER BENEFITS RECEIVED. (Ill.Rev.Stat. 1985, ch. 48, par. 1614(h)(6),

7) CHANGES IN ANY OF THE FOREGOING CIRCUMSTANCES DURING THE PENDENCY OF THE ARBITRATION PROCEEDINGS. (Ill.Rev.Stat. 1985, ch. 48, par. 1614(h)(7).

8) SUCH OTHER FACTORS, NOT CONFINED TO THE FOREGOING, WHICH ARE NORMALLY OR TRADITIONALLY TAKEN INTO CONSIDERATION IN THE DETERMINATION OF WAGES, HOURS AND CONDITIONS OF EMPLOYMENT THROUGH VOLUNTARY COLLECTIVE BARGAINING, MEDIATION, FACT-FINDING, ARBITRATION OR OTHERWISE BETWEEN THE PARTIES, IN THE

Additionally, Section 15 of the Act provides in relevant part:

> (a) In case of any conflict between the provisions of this Act and any other law, executive order or administrative regulation relating to wages, hours and conditions of employment and employment relations, the provisions of this Act or any collective bargaining agreement negotiated thereunder shall prevail and control....
>
> (b) Except as provided in subsection (a) above, any collective bargaining contract between a public employer and a labor organization executed pursuant to this Act shall supersede any contrary statutes, charters, ordinances, rules or regulations adopted by the public employer or its agents. Any collective bargaining agreement entered into prior to the effective date of this Act shall remain in full force during its duration.

Ill. Rev. Stat. 1987, ch. 48, ¶1615.

As the City conceded during the hearing, it could agree to Local 726's proposal, and if it were to do so, then the parties' collective bargaining agreement would take precedence over the Illinois Municipal Code, Ill. Rev. Stat. 1987, ch. 24, ¶10-2.1-17, which establishes the Fire and Police Commission (Tr. 13).

B. A Comparison of Conditions of Employment Of The Employees Involved In The Arbitration Proceeding With Those Of Other Employees

1. Other Police and Fire Bargaining Units in Illinois

In support of Local 726's proposal, it presented samples of collective bargaining agreements between other public employers and unions covering both police and firefighter bargaining units, that, like the City of Markham, have a Fire and Police Commission (Union Exs. 4, 4(a)-(v), 5, 5(a)-(p)). Each of the twenty-one (21) sample collective bargaining agreements 3/ covering a unit of

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Union's Footnote 3/

> These collective bargaining agreements are public records filed with the Illinois State Labor Relations Board in accordance with Section 1230.40(a)(1) of the Board's Rules and Regulations.

substantial support for the adoption of Local 726's final proposal.

2. Other Employees Within the City of Markham

Perhaps the most important consideration in support of the adoption of Local 726's final proposal is the City of Markham's collective bargaining agreement with the American Federation of State, County and Municipal Employees (AFSCME), AFL-CIO, Council 31 ("AFSCME") (Union Ex. 3).

The Management Rights Clause contained in the AFSCME collective bargaining agreement provides that the City of Markham has the right to "discharge employees for just cause" Id. Article IV, Section 1 of the collective bargaining agreement provides that "[a[ny grievance, disagreement or complaint which may arise between the parties, concerning the application, meaning or interpretation of this agreement, shall be settled in the following manner...." The City of Markham/AFSCME grievance mechanism provides for four (4) steps culminating in the right to appeal the matter to arbitration. This grievance procedure covers discipline of the City's employees in the Public Works Department (Tr. 36-37, Union Ex. 3). 6/

The adoption of Local 726's proposal in this case merely places the bargaining unit employees in this unit in the same position as other employees in the City of Markham and therefore, is just and equitable. The adoption of Local 726's proposal also results in a sense of fairness amongst employees who are organized in the City and places the City in a position with no more responsibility than it already has to the Public Works Department employees.

Union's Footnote 6/

> During the hearing in this matter, the parties stipulated that the City of Markham is party to a collective bargaining agreement with AFSCME which contains a grievance procedure covering discipline of Public Works Department employees (Tr. 36-37). However, the City attempted to distinguish its adoption of the grievance mechanism for discipline in the Public Works Department contending that the adoption of the Civil Service Commission is permissive (Tr. 36). However, as the Board of Arbitration previously ruled, the application of the grievance mechanism to discipline is a mandatory subject of bargaining. Thus, the City of Markham's argument is nothing more than a distinction without a difference.

> Regulations and therefore cannot address their contents. However, it is Local 726's position that they have no bearing on the issue before this Arbitration Panel.

Since Ray Ashley's appointment to the Fire & Police Commission, the Commission has heard approximately five discharge cases of which none of the officers were reinstated with pay (Tr. 85-86). The Commission has generally ruled more often in favor of the City (Tr. 87).

At least some of the employees in the bargaining unit obviously do not believe that the City of Markham's Fire & Police Commission issues fair decisions. William Barron, an officer with the Department for 13-1/2 years, testified that he has received complaints from officers in the bargaining unit regarding the Fire & Police Commission (Tr. 106, 108).

In order to bring a sense of fairness to the disciplinary process, employees who are disciplined by the City of Markham should have the opportunity to have their appeals heard by a neutral party, if they so choose, and not by a panel that is appointed by the City which is deemed by at least some of the officers as impartial.

IV.

PUBLIC POLICY FAVORS ARBITRATION AS THE MECHANISM TO RESOLVE DISPUTES BETWEEN THE PARTIES

> There can be little doubt today that in American labor law the arbitration process is the primary mechanism for resolution of disputes arising under collective bargaining agreements. As the Supreme Court has explained, the grievance-arbitration procedure is the very heart of the system of industrial self-government. Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for all their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content is given to the collective bargaining agreement. ... The grievance procedure is, in other words, a part of the continuous collective bargaining process.

C. J. Morris, The Developing Labor Law 914 (2d ed., Vol. I) (footnote omitted) citing Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581 (1960).

OPINION

At the outset, the Board reaffirms, in its entirety, its findings and ruling with respect to the arbitrability issue and, by way of reference, incorporates those findings and ruling in this Award. The Board is convinced that the Employer's expressed misgivings about the findings and ruling on the arbitrability issue are misplaced and further, that its view the Board misinterpreted applicable provisions of the Illinois Public Labor Relations Act (IPLRA) is not only unwarranted, it is also incorrect. The Board is profoundly confident that if the Employer opts to take both the arbitrability and the merit holdings of this case for court review, its Opinion and Award will ultimately prevail.

With regard to the Employer's position that it is not obligated to bargain over the disputed issue pursuant to Section 7 of the IPLRA on the grounds the Union's proposal is in violation of applicable provisions of the Fire and Police Commission (FPC) statute, the Board deems this argument to be invalid. The Board holds the view that it is one thing to contend a conflict exists between provisions contained in a collective bargaining agreement and those contained in a statute, but quite another thing to contend the provisions of one are in violation with the provisions of the other. The Board might have been persuaded otherwise with regard to the Employer's contention of a violation had the thrust of the Union proposal been to eliminate completely and altogether the jurisdiction of the FPC in matters of all discipline. In reality, however, the effect of the Union proposal here is to maintain the jurisdiction of the FPC but to do so on a side-by-side basis with the contractual grievance-arbitration procedure so as to permit the bargaining unit employee a choice as to which forum he/she prefers to seek redress of his/her claim(s). Such a democratic approach is not uncommon as evidenced by the 21 collective bargaining agreements entered into between police unions and other Illinois municipalities that provide for the election on the part of bargaining unit employees to redress disciplinary actions either through the contractual grievance-arbitration procedure or through the statutory procedures of a Fire and Police Commission (Un. Grp. Ex. 4); and as further evidenced by the 12 collective bargaining agreements entered into between unions representing firefighters and other Illinois municipalities that provide for the same choice (Un. Grp. Ex. 5). While judicial notice has been taken by the Board of the Employer's point regarding the absence of bargaining history and other evidence providing insight as to why the parties in these 33 other contracts mutually agreed to the coexistence of procedures dealing with discipline, it is our view that the reasons are less important than the actual fact of the proliferation of bargaining relationships that have established a dual procedure and the apparent success of the coexistence of the procedures. The Board also finds significant that the Employer here has, in another bargaining relationship with the Union, American

perhaps too many when the monetary costs are calculated and taken into consideration and, according to Petkovich, retaining the FPC as the sole jurisdiction over the range of discipline greater than a 5 day suspension up through discharge was the one issue the Employer wanted as a quid pro quo for all the other items it agreed to grant the Union. The Board recognizes the Employer's lament as a classic one, particularly in bargaining situations involving an initial agreement. In essence, however, such a view is skewed and does not permit the recognition of reality which is, that in most, if not all, bargaining situations, both parties have mutually benefitted and neither party can be said to be a winner or a loser. The Board has no doubt that the concessions made by the Employer will increase the costs of operating the Police Department, but, at the same time, as recognized and acknowledged by the Employer, addressing and meeting the economic demands of the bargaining unit employees has the potential for motivating the officers to generate increased revenue for the City. If such a scenario materializes, then the Employer need not dwell on the concessions it has made as being a lop-sided bargain, nor should such a preoccupation by the Employer frustrate the Union's obtaining a non-economic demand for a due process procedure for their members to redress grievances involving the full range of disciplinary actions. While the Board grants that the utilization of either forum results in costs to both parties, there has been no showing by way of probative evidence that the costs involved in using the grievance-arbitration procedure is significantly greater than the costs involved in using the services of the FPC. Absent such evidence, this Board cannot and will not nix the Union's proposal based on either the Employer's argument of cost or its view it will have lost a quid pro quo by the Board's accepting the Union's proposal.

This Board believes in the generally held view among practitioners in the labor relations field that the heart of any collective bargaining agreement is not the economic benefits but rather the grievance and arbitration procedures which serve to protect employees against discretionary actions by the Employer deemed to be arbitrary, capricious and discriminatory. Indeed, the lessons of labor history and labor law over the last 100 years have demonstrated the efficiency and effectiveness of redressing employee grievances through contractual grievance-arbitration procedures. There is no better endorsement of this procedure than that given by the United States Supreme Court in the Steelworkers Trilogy Cases rendered in 1960. The Court's endorsement of the procedure resides in the recognition that arbitration is the best suited forum for the resolution of everyday problems that arise in the workplace as a result of differences between labor and management as to the interpretation and application of the collective bargaining agreement. This Board concurs in this endorsement and, absent any finding by us that any of the arguments advanced by the Employer are persuasive, coupled further with our judgment that the Union has presented sufficient and persuasive evidence in support of its proposal, we rule to accept the Union's proposal.